Mohamad Toufik Al-Ozeir & Anor v American Express Bank Ltd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–935–93
ABDUL MALEK J
17 MAY 1994

Civil Procedure *— Jurisdiction — Contract — Effect of jurisdiction clauses — Whether court's jurisdiction ousted — Whether contractual clauses applicable to claims in tort*

Tort *— Misrepresentation — Fraudulent or negligent — Made via telephone or telex — Whether tort committed where message sent or where it was received*

Civil Procedure *— Jurisdiction — Forum non conveniens — Whether convenience a factor to be considered if tort committed within jurisdiction*

The plaintiffs and the defendant, an international banking corporation with a branch in Singapore, had entered into two contracts in respect of foreign exchange transactions whereby the defendant was to assist the plaintiffs in their dealings. The plaintiffs alleged that the defendant had breached the fiduciary duty owed to them by fraudulently communicating false information to them in Kuala Lumpur and filed a statement of claim against the defendant for damages of approximately US$20m. Leave to serve out of the jurisdiction was granted.

Subsequently, the defendant applied to discharge the order granting leave to issue the notice of the writ against the defendant and to serve it out of jurisdiction, and for both the writ and service thereof to be set aside on the grounds that: (i) the court had no jurisdiction as the alleged tort of deceit and fraud was committed outside the jurisdiction and that all the facts and matters giving rise to the claim took place either in London or Singapore; (ii) it had been expressly agreed in the contracts that all disputes should be determined exclusively in accordance with the laws of Singapore and by the courts of Singapore; and (iii) Singapore was the more proper and convenient forum as the defendant and the material witnesses were from Singapore or elsewhere but not from Malaysia.

Held, dismissing the defendant's application:

(1) The clauses relating to the governing law and jurisdiction in the contracts were not relevant as the claim was in tort and not contract. Therefore, the court had jurisdiction over the matter as the misrepresentation was made to the plaintiffs in Kuala Lumpur. The tort of fraudulent or negligent misrepresentation when made by telephone or telex is committed at the place where the message is received and acted on, and not the place from which it was sent.

(2) The plea of forum non conveniens could not be entertained as the tort had been committed in Malaysia. This finding overrode the considerations that the two contracts were executed in Singapore,

there were specific clauses on governing law and jurisdiction in the contracts, that the transactions had been concluded outside Malaysia and the cost of bringing in witnesses, because if they were from neither country, the cost of bringing them to either Singapore or Malaysia would be quite the same.

[Bahasa Malaysia summary

Plaintif dan defendan, sebuah korporat bank antarabangsa yang mempunyai sebuah cawangan di Singapura, telah mengikat dua kontrak berkenaan dengan transaksi pertukaran asing di mana defendan akan menolong plaintif menjalani urusan mereka. Plaintif mengata bahawa defendan telah memungkiri kewajipan fidusiari kepada mereka dengan menyampaikan maklumat palsu kepada mereka secara fraud di Kuala Lumpur dan telah memfailkan suatu pernyataan tuntutan terhadap defendan untuk ganti rugi sebanyak lebih kurang AS$20 juta. Kebenaran untuk menyampaikan notis writ itu di luar bidang kuasa telah diberikan.

Kemudiannya, defendan telah memohon untuk mengetepikan perintah yang memberi kebenaran untuk mengeluarkan notis writ itu terhadap defendan dan untuk menyampaikannya di luar bidang kuasa, dan supaya kedua-dua writ dan penyampaiannya diketepikan atas alasan bahawa: (i) mahkamah tidak mempunyai bidang kuasa kerana tort memperdaya dan melakukan fraud yang dikatakan itu telah dilakukan di luar bidang kuasa dan semua fakta dan perkara yang menimbulkan tuntutan itu berlaku di London atau di Singapura; (ii) telah nyata dipersetujui di dalam kontrak tersebut bahawa semua pertikaian hanya akan diputuskan mengikut undang-undang Singapura dan oleh mahkamah Singapura; dan (iii) Singapura merupakan tempat yang lebih wajar dan sesuai kerana defendan dan saksi-saksi penting datang dari Singapura dan lain-lain tempat tetapi bukan dari Malaysia.

Diputuskan, menolak permohonan defendan:

(1) Fasal-fasal di dalam kontrak itu yang berkenaan dengan undang-undang dan bidang kuasa yang terpakai tidak menjadi relevan kerana tuntutan itu berdasarkan tort dan bukannya kontrak. Oleh itu, mahkamah mempunyai bidang kuasa ke atas perkara itu kerana salah nyata itu telah dilakukan kepada plaintif di Kuala Lumpur. Tort melakukan salah nyata fraud atau cuai apabila dibuat melalui telefon atau teleks dilakukan di tempat di mana perutusan itu diterima dan di mana tindakan diambil terhadapnya, dan bukan di tempat dari mana ia dihantar.

(2) Pli mengenai forum non conveniens tidak boleh diterima kerana tort itu telah dilakukan di Malaysia. Pendapat ini mengatasi pertimbangan bahawa kedua-dua kontrak itu telah disempurnakan di Singapura, terdapat fasal spesifik di dalam kontrak itu berkenaan dengan undang-undang dan bidang kuasa yang terpakai, bahawa transaksi itu telah disempurnakan di luar Malaysia dan kos mendapatkan saksi, kerana jika mereka tidak berasal dari Singapura

mahupun Malaysia, kos membawa mereka ke Singapura atau Malaysia lebih kurang sama.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–225–94.

Notes

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed) paras 1407–1409; [1990] Mallal's Digest 390–391; and [1992] Mallal's Digest 287.

For a case on misrepresentation, see [1989] Mallal's Digest 1497.

Cases referred to

1 *Petersen v Ab Bahco Ventilation* (1979) 107 DLR (3d) 49 (folld)
2 *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 (folld)
3 *Original Blouse Co Ltd v Bruck Mills Ltd* (1963) 42 DLR (2d) 174 (folld)
4 *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91 (folld)
5 *Tengku Aishah bte Sultan Hj Ahmad Shah & Ors v Wardley Ltd* [1992] CLJ 1279 (not folld)

G Sri Ram (*Fiona Bodipalar* with him) (*Sri Ram & Co*) for the plaintiffs.
K Anantham (*Skrine & Co*) for the defendant.

Abdul Malek J: The plaintiffs, a married couple residing in Kuala Lumpur, had in their statement of claim filed on 25 August 1993, prayed for special damages in the sum of US$10,550,000, general damages for deceit and fraud not exceeding US$10m and costs and other relief against the defendant which is an international banking corporation with a branch in Singapore. The details of their foreign exchange transactions and particulars of alleged fraud had been pleaded quite substantively in the statement of claim. Leave to serve out of the jurisdiction had been granted on the same date as the filing of the statement of claim.

By a summons-in-chambers filed on 24 December 1993, the defendant had applied to discharge the order of 25 August 1993 giving the plaintiffs leave to issue the notice of the writ of summons against the defendant and to serve the same on the defendant out of the jurisdiction and for both the writ of summons and the service thereof to be set aside. The grounds stated immediately after the prayers were that the court had no jurisdiction to entertain the plaintiffs' claim as the alleged tort of deceit and fraud, which is denied, was committed wholly outside the jurisdiction of the court and that all the facts and matters giving rise to the plaintiffs' claim, which are denied, took place either in London or Singapore and that it had been expressly agreed that all disputes between the parties arising out of the contracts should be determined exclusively in accordance with the laws of Singapore and by the courts of Singapore.

It is quite evident from cl 19 of the Foreign Exchange Metal and Option Trading Agreement entered into between the parties that:

Governing law and jurisdiction

This agreement and each contract shall be governed by and construed in accordance with the laws of Singapore and the customer hereby irrevocably submits to the non-exclusive jurisdiction of the Singapore courts, provided that such jurisdiction, at the sole option of the bank, shall not be exclusive. The customer waives any objection on the grounds of venue or forum non conveniens or any similar grounds and agrees that any writ, summons, order, judgment or other document shall be deemed duly and sufficiently served if addressed to the customer and left at or sent by post to the address of the customer last known to the bank.

They had also entered into a Securities Services Agreement, where cl 26 reads:

Governing law and jurisdiction

These conditions shall be governed by and construed in accordance with the laws of Singapore and the parties, for the purposes of s 3(3) of the Judicial Committee Act, hereby consent to be bound by the decision of the Judicial Committee of the Privy Council on any appeal thereto in respect of any dispute hereunder. The customer hereby irrevocably submits to the jurisdiction of the Singapore courts, provided that such jurisdiction, at the sole option of the bank, shall not be exclusive. The customer agrees that any writ, summons, order, judgment or other document shall be deemed duly and sufficiently served if addressed to the customer and left at or sent by post to the address of the customer last known to the bank.

These two agreements had been executed on the defendant's representation to the plaintiffs that they would assist them in their foreign exchange dealings. In consequence, the plaintiff had given certain instructions to the defendant from Kuala Lumpur for dealings transacted in Singapore, London and New York. The plaintiffs maintain that the defendant owed them a fiduciary duty which they had subsequently breached by fraudulently communicating false and misleading information to the plaintiffs in Kuala Lumpur.

Learned counsel for the defendant had ably argued that the subject matter of the claim is a claim in contract although the plaintiffs say that it is a claim in tort. He added that that the only event which had taken place in Malaysia is the receipt of instructions as the act of misrepresentation is where the recipient is. There was nothing in the statement of claim, he submitted, to show that the plaintiffs had acted on the alleged misrepresentation. He went on to say that the plaintiffs had communicated their strategies to the defendant but their instructions were never carried out. This, he said, and the allegations that the defendant had credited the plaintiffs' profits into the defendant's account and that the defendant had terminated the contract unlawfully, related to breach of contract and had nothing to do with tort.

He had further stated that the alleged deceit and fraud had been committed wholly outside the jurisdiction, that the agreements entered into prior to the trading had been executed in Singapore, all the transactions concluded pursuant to the agreements were effected in Singapore, New York and London, all securities were deposited by the plaintiffs with the defendant's

Singapore and London branches, and apart from the agreements clearly providing for all disputes to be adjudicated in Singapore, Singapore was the more proper and convenient forum as the defendant and the material witnesses were from Singapore or elsewhere but not from Malaysia.

Learned counsel for the plaintiffs had in reply eloquently enunciated that the submissions had traversed outside the ambit of the application as it is to set aside leave to serve out of the jurisdiction and not under O 18 r 19 of the Rules of the High Court 1980 or to stay the proceedings on the grounds of forum non conveniens. The only question, he remarked, was whether the court had the jurisdiction to hear the complaint in the statement of claim.

He had commented that learned counsel for the defendant's arguments had somewhat strayed outside the purview of their application as leave was not being sought to be discharged on the grounds that the claim is based on contract and not in tort. He further submitted that the statement of claim had shown the existence of a fiduciary duty and the court had to consider the alleged fraud based on that fiduciary duty and where it was committed. The misrepresentation, he added, had been made to the plaintiffs in Kuala Lumpur who had then taken their stand and to obtain an unfair advantage, the defendant had breached their fiduciary duty by concealing material facts.

As for the clauses relating to the governing law and jurisdiction in the relevant agreements, learned counsel for the plaintiffs had argued that they were not relevant as the claim was in tort, following the decision in *Petersen v Ab Bahco Ventilation*.[1] The facts there were that a distributorship agreement with respect to automobile preheaters had been entered into in Sweden but an alleged fraud had been perpetrated by representatives of the Swedish manufacturer making false representations about defects in the preheaters to the distributor in British Columbia during the lifetime of the agreement. An alleged conspiracy had also taken place when a Swedish lawyer, allegedly knowing of the fraud on the part of the manufacturer, went to British Columbia in order to persuade the distributor to agree to a settlement, which the distributor agreed to. It was held that the alleged torts had taken place in British Columbia and the British Columbia courts had jurisdiction. It was further held that the victims of the alleged fraud and conspiracy were all resident in British Columbia, massive damages were sustained in British Columbia and the subject matter of the fraud and conspiracy, namely, the preheaters were sold and distributed throughout British Columbia. The court also ruled that since it could be said that British Columbia was substantially affected by the defendants' activities or the consequences, it was not in the reasonable contemplation of the parties that the conduct of the defendants, involving great financial loss in British Columbia to residents of that province, could only be adjudicated upon by a Swedish tribunal under Swedish law.

Despite stating that the cause of action had originated either in London or Singapore, learned counsel for the defendant had in fact quite candidly conceded that the court had jurisdiction as the instructions were received here, in direct reference to *Diamond v Bank of London and Montreal Ltd*[2] where the Court of Appeal in England had ruled that the tort of fraudulent

or negligent misrepresentation when made by telephone or telex is committed at the place where the message is received and acted on, and not the place from which it was sent. On this concession alone, the defendant's application must fail. It must be pointed out here that similar decisions had been reached in *Original Blouse Co Ltd v Bruck Mills Ltd*[3] and *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)*.[4] Learned counsel had, however, added that the court must be satisfied that there is a good arguable case and good defence as it is not disputed that both contracts were signed in Singapore. He also contended that the plaintiffs had sued in tort as it was difficult to prove on contract. As such, the claim was lacking in bona fides and was damaging to the defendant. In stating that the discretion had to be exercised in favour of the defendant, he had cited the case of *Tengku Aishah bte Sultan Hj Ahmad Shah & Ors v Wardley Ltd*.[5] However, it had been promptly pointed out by learned counsel for the plaintiffs that although the decision there, on similar questions of law, was that the court had no jurisdiction to decide and determine the dispute before the court and that the notice of the writ and summons served outside the jurisdiction was not a proper exercise of that discretion, that ruling had been reversed by the Supreme Court on 11 November 1993 vide Supreme Court Civil Appeal No 03–79–91.

As regards the forum non conveniens, which plea is more frequently stated than sustained, it is my view that this issue cannot be entertained as it is not really in dispute that the tort had been committed in Malaysia. This finding in effect overrides the other considerations, namely, that the two agreements were executed in Singapore, that there were specific clauses on governing law and jurisdiction in those agreements, that the transactions had been concluded outside Malaysia, whether there is a good arguable case, and the question of expenses, as either party would incur more expenses if the trial is held in the country of the other party. As for the witnesses, if they are from neither country, the cost of bringing them to either Singapore or Malaysia would be quite the same.

In the circumstances, it was my finding that there was no merit to this application and it was accordingly dismissed with costs.

Application dismissed.

Reported by Anne Khoo